

Metal Mine Performance Bonds and State Liability

Are there any deficiencies?

A Report Prepared for the
Legislative Finance Committee
by

Roger Lloyd
Revised February 29, 2000



TABLE OF CONTENTS

Introduction	2
How It's Supposed To Work.....	3
Are There Problems?	3
Pegasus.....	4
Potential Problems	5
Problems/Root Causes/Solutions.....	6
Adequacy Of Performance Bonds	7
Unforeseen Events/Changes in Circumstances	7
Complexity/Objectivity	7
Statutory Limitations	8
Ability To Get The Money.....	8
Unforeseen Events/Changes in Circumstances	8
Surety Bond/Legal Agreement Limitations	9
Statutory Limitations	10
Focus on the Entire Environment	11
Other	11
Legislative Options	12
Solution Summary	12
Adequacy of Performance Bonds.....	12
Ability to Get the Money	13
Focus on the Entire Environment.....	13
Other	14
Avenues Of Action	14

Introduction

Although Montana's metal mine performance bond statutes are adequate in most cases, there are deficiencies.

In certain instances, statutes are not providing the financial security necessary to protect the state from costs being incurred for metal mine reclamation. As a result, the state faces a possible one-time cost of \$600,000, a possible bill of \$490,000 over the 2001 biennium, an identifiable liability of \$24.6 million, and a potential liability of an unidentifiable amount. Under ideal conditions, the statutes ensure reclamation at no cost to the state. Seldom, though, are conditions ideal and, although the process appears foolproof on paper, the state is now faced with paying for certain metal mine reclamation costs.

This analysis was prompted by legislative interest in the status of metal mine performance bonds after the Pegasus bankruptcy, public concern over metal mine reclamation and the adequacy of performance bonds, and recent incidents at metal mines. It builds upon the work performed by the Legislative Audit Division in 1997 and 1998.

The objectives of the analysis were to:

- ◆ identify any real or potential liability to the state in the area of metal mine reclamation and performance bonds;
- ◆ examine the causes for any liability; and
- ◆ offer possible solutions.

It was not an objective of this report to address the economic benefits of mining or to provide a cost/benefit analysis.

The analysis looked for instances, circumstances, and deficiencies in the process that have caused liability or that have the potential to put the state at risk. In the course of the analysis other issues relating to the performance bonding process were discovered including complexities of issues peculiar to bankruptcy. This report examines the underlying causes of the problems and provides possible solutions to them and the related issues for legislative consideration.

The basic underlying premise of the analysis was that the legislature intended no state money be spent for reclamation. The identification of solutions was approached with the goal of identifying actions that lessen or eliminate the risk of liability to the state. The overall philosophy of the process could be stated as: *Enough safeguards should be in place to ensure, in any event, that the state incurs no cost or liability for metal mine reclamation.*

Throughout the report, a couple of terms are used that need defining:

1. As used in statute, a performance bond is any monetary instrument, payable to the state, in the amount of the estimated cost to the state of reclamation. It can be a surety bond, cash, certificate of deposit, letter of credit, or other forms. The use of the single word "bond" in this report means "performance bond".
2. A surety bond is a written agreement between the principal (the mining company), the surety company, and the obligee (the state) that provides protection in the form of monetary

compensation (a fixed dollar amount) if the principal fails to perform the acts (reclamation) as promised (commitments contained in the reclamation plan and plan of operation).

The report was made possible to a large degree by the knowledge and cooperation of Department of Environmental Quality (DEQ) staff. Their insights contributed much to the content of the report and several of the solutions incorporate their thoughts and ideas. Based on lessons they have learned and deficiencies discussed in this report, the department is in the process of implementing measures to address some of the deficiencies.

How it's Supposed to Work

The legislature has established a process in statute to ensure the public safety, prevention of pollution of air or water, and the reclamation of metal mine sites at no expense to the state. In brief, the process is supposed to work as follows:

- ◆ The mining company submits an application for an operating permit containing, among other items, the proposed reclamation plan and a plan of operation to DEQ.
- ◆ DEQ fulfills the necessary environmental analyses required under the Montana Environmental Policy Act.
- ◆ DEQ reviews, modifies (if necessary), attaches conditions to the operating permit (if any), and if appropriate, either approves or denies the permit.
- ◆ The amount and form of the performance bond is determined by DEQ. The department calculates the reclamation costs (and sets the bond accordingly) to be not less than the estimated cost to the state to ensure compliance with the statutes, rules, and operating permit.
- ◆ After receipt of the required bond and payment of the basic \$25 fee, the operating permit is issued. Permits remain valid until completion or abandonment of the operation or revoked by the department.
- ◆ DEQ is required to conduct an overview of the bond amount each year (this requirement was enacted by House Bill 183 in the 1999 session) and to conduct a comprehensive review of the bond every five years. It also is allowed to review the bond if there are changes in the reclamation plan or operating permit. If indicated by the annual overview or comprehensive review, DEQ may require a change in the bond amount.
- ◆ After completion of the operation (or sometimes during the operation), reclamation commences. If reclamation is completed according to plan, the bond (or a portion of it) is released. If it is not or if, after default by the mining company, the surety company fails to perform the reclamation, the department must cause the bond to be forfeited.
- ◆ If the bond is forfeited, the department may use the proceeds from the forfeiture to complete the required reclamation. If the reclamation costs to the state exceed the amount of the bond, the mining company is liable for the difference. If money is left over, the state must return the unspent amount to the surety.

Are There Problems?

Deficiencies in the process are evident from problems that have surfaced and left the state with a possible \$1,090,000 bill over the 2001 biennium. To pay for water treatment costs at the Zortman-Landusky mines, DEQ anticipates spending \$245,000 each year of the 2001 biennium of state and federal money partially with appropriations given by the legislature for other

purposes. In addition, after cancellation by a surety company the state has become liable for the final zero coupon bond payment of up to \$800,000 that must be paid by December 2000 to a trust fund established by the Billings Federal Court Consent Decree in 1996 for water treatment at the Zortman-Landusky mines. The department has some surety and interest money available to make a partial payment, but may need up to \$600,000 general fund from its operating budget to complete the payment. The 2001 legislature may be asked to approve a general fund supplemental appropriation to replace this money.

As part of the analysis for this report: 1) statutes in other states and provinces were reviewed and applicable staff interviewed; 2) legislative staff were consulted; 3) staff and management of DEQ were interviewed; and 4) metal mine permitting files at DEQ were researched in November 1999. The amount of performance bonds on file at DEQ was compared to documented reclamation costs at each permitted mine. The analysis indicated that estimated reclamation costs exceeded performance bonds by \$24.6 million. The former Pegasus mines account for \$10.0 million of this amount. The following discussion illustrates some of the problems, potential problems, and risks associated with metal mine reclamation and performance bonds. The bankruptcy of Pegasus offers a good case study of the degree to which statutes protect the state's interest in extreme cases.

Pegasus

Although statute requires a mining company to be liable for reclamation costs over the bond amount, it becomes nearly meaningless if the state must litigate its claim to a company's assets and stand in line behind other creditors. Although in 1996 DEQ had calculated that an additional \$8,556,000 in bonding was needed to cover reclamation costs at Zortman-Landusky mines, Pegasus did not make this payment¹. Contributing to this liability left to the state from the bankruptcy of Pegasus were the lengthy time between reclamation cost recalculations and the unexpected nature of the bankruptcy.

No surety bonds held by the state for the former Pegasus mines were forfeited. The DEQ and respective surety companies negotiated performance under the bonds. Because the department was faced with possible cancellation of the surety bonds and lengthy litigation, concessions were made so DEQ would not have to pay immediate reclamation costs and to ensure that water treatment money was available for the Zortman-Landusky mines when the bankruptcy was completed. Because of the negotiated agreements, the state does not have immediate access to the entire amount of the bonds and must spend other money for reclamation costs. In addition, portions of the money to which it does have access are restricted in use. Not all of the surety bonds can be applied to all facets of the reclamation, but rather certain surety bonds can only be used for certain reclamation activity. Because technically no surety bonds have been forfeited, section 82-4-360, MCA, does not apply. This section provides that no company shall conduct mining activity in the state if it or an associated company had a bond forfeited. Because the reorganization of Pegasus under Chapter 11 created Apollo Gold, an entirely new parent corporation, some mines previously operated by Pegasus continue to operate and make profit in

¹ However, DEQ was able to recover \$1,050,000 by convincing the bankruptcy court that they were entitled to administrative expense priority status, thus leaving the state with a \$7,506,000 liability.

the state at the same time that the state has a \$10.0 million liability at other mines previously owned by Pegasus.

Understandably, mining and surety companies do not want the surety bonds to be forfeited and are willing to pursue legal avenues to that end. Therefore, surety bonds are not the “money in the bank” that the legislature may have thought they were when bonding statutes were enacted. Surety bonds may be costly to liquidate (litigation), negotiated down to a lesser amount, paid out over time rather than a lump sum, or have other conditions attached to them. Litigation is not cheap. In anticipation of litigation with surety companies that hold bonds for the former Pegasus mines, the legislature appropriated \$194,000 general fund to DEQ for the 2001 biennium. The current surety bond form used by DEQ does not obligate the surety company to pay litigation costs. The form also does not require that the full amount of the surety bond be immediately available to DEQ if the mining company defaults or DEQ forfeits the surety bond.

The large sizes of the former Pegasus mines show the complexities of estimating reclamation costs. No longer does reclamation just consist of moving dirt and revegetation. Costs of water quality compliance capture systems and primary treatment facilities need to be calculated and long-term operation and maintenance costs projected into the future and, in some cases, into perpetuity. Irrevocable charitable trust agreements that provide for up-front funding in financial instruments such as U.S. Treasury and agency zero coupon bonds need to be structured and the present and future value of money estimated. Bankruptcy brings with it its own different set of financial (and legal) complexities. In short, financial expertise, in addition to engineering expertise, is becoming valuable and necessary in determining the correct bond amounts to protect the state. Previous audit work by the Legislative Audit Division noted concerns over control weaknesses and documentation with bonds and financial assurances. It was recommended that the surety duties of mine bond management be segregated from the technical review of reclamation or corrective action proposals to limit the risk to the state.

Potential Problems

Other *potential* problems exist. In 1991, the legislature required the department to comprehensively review performance bonds every five years. In 1999, annual overviews of the bond amounts were required. Although reclamation cost calculations allow for cost inflation over time, when costs are recalculated during the comprehensive bond review at the end of the five years it may be found that the real cost of reclamation exceeds the bond amount. For example, September 1999 recalculations of reclamation costs at one mine indicated an increase in costs of \$7.3 million (163 percent) over the current bond amount calculated in August 1994. This means that if the company had defaulted (or gone bankrupt) during that time or before the increased bond was received by the department, the state would have been left with a liability. This also illustrates another potential problem. Even if a comprehensive review or annual overview indicates an increase in the bond amount is required, negotiations between DEQ and the mining company over the final amount may substantially extend the time before the increased bond amount is actually received. For example, the initial bond review for one mine began March 1998 and the final amount was determined November 1999, 1.7 years later. During this period, the state held a bond for an amount less than the estimated cost of reclamation.

Court interpretations of the Montana Constitution as it relates to mining, reclamation, and the environment or changes to statutes by the legislature may leave the state with a liability. These interpretations and changes may require modifications in the reclamation or operating plan and subsequently modifications in the estimated reclamation costs and the bond amount. Although statute allows the department to modify the reclamation plan in these instances, it does not require it nor does it provide a timeframe for making the modifications. If a mining company defaults (or goes bankrupt) before the modifications are in place, the state would not have enough money to complete the reclamation according to existing law.

Some mining activities have a cap on the bond amount. For other mining activities, no reclamation is required and, hence, there is no performance bond. Small miners may be permitted to disturb up to 100 acres with a maximum of 5 acres unreclaimed at any point in time. Statute limits the amount of the performance bond for small miners involved in placer or dredge mining to a maximum of \$10,000. If the miner defaults and the state conducts the reclamation, the miner is liable for costs that exceed the bond amount. However, if the miner declares bankruptcy or otherwise defaults, the state's chances of recovering some of the costs are reduced. If the state does pursue legal remedies, it will incur additional litigation costs. Small miners who conduct hard rock mining operations are not required to reclaim and, therefore, do not post performance bonds.

Uncertainties and assumptions used to estimate reclamation costs may contribute to a situation where actual reclamation costs exceed the bond amount. In addition, unforeseen events may occur that increase reclamation costs, cause unanticipated environmental degradation, or increase the liability of the state. Events such as accidents, equipment failure, or natural disasters may be minor or catastrophic in nature. The larger the mine, the greater the potential impact of such events becomes. If the state becomes responsible for the reclamation, it immediately becomes subject to liability in the event of an accident or catastrophe and subject to paying unanticipated costs. Problems may become evident at a site or off-site long after a mine has closed, reclamation completed, and the bond released. Groundwater degradation, health hazards, or the full effects of the mining operation may be unknown until the future, slow in developing, or slow in being discovered. If problems do develop, the state may be held liable but would have no bond money left to address the problems. Reclamation cost calculations do not include a contingency factor for such events nor do statutes allow bonding for them. Statutes limit bonding to "reasonably foreseeable activities" and to "activities... having a reasonable possibility of occurring". Although the probability of such events occurring may be small, the fiscal impact on the state could be substantial if they do.

Problems/Root Causes/Solutions

As the discussion above shows, problems now exist. The potential for problems in the future also exists. Although many individual problems were discussed, the underlying reasons for them can be grouped into four main areas: 1) adequacy of performance bonds; 2) ability to get the money; 3) focus on the entire environment; and 4) other. The problems and possible solutions for the legislature to consider for reducing the risk of liability are discussed below.

Adequacy of Performance Bonds

If the state is to have no liability and incur no cost for reclamation, the amount of the performance bond must always be sufficient to pay the entire cost of actual reclamation. From the discussion above it was shown that bonds are not always adequate to pay these costs. Problems in this area can be categorized in three groups.

Unforeseen Events/Changes in Circumstances

1. Problem: Uncertainties and assumptions in reclamation cost calculations and unforeseen events may occur that increase reclamation costs, cause unanticipated environmental degradation, or increase the liability of the state.
Solution: Amend statute to allow contingencies for uncertainties and unexpected events to be included in reclamation cost calculations and the bond amount
2. Problem: During the five years between comprehensive bond reviews and reclamation cost recalculations (costs are not recalculated for the annual overview although the overview may trigger a more comprehensive review), the costs may have increased above the amount of the bond held by DEQ.
Solution: Require a comprehensive bond review and recalculation of the reclamation costs sooner than the current five years (some states perform the review every two years)
3. Problem: A potential liability may exist between the time when the comprehensive bond review and reclamation cost recalculation (or other events) indicate a needed increase in the bond amount and when DEQ actually receives the increased amount.
Solutions: After any bond review (or other events) indicates an increase in bond is needed:
 - A. require DEQ to give the mine operator notice of the additional bond within 30 days and require the posting of additional bond within 30 days of notice from DEQ and before consultation with the operator
 - B. require the posting of additional bond prior to any contested case hearing
4. Problem: Changes in reclamation plans, operating plans, estimates of reclamation costs, and performance bonds may lag behind interpretation or changes in law.
Solution: If judicial decisions or statutory changes make either the reclamation plan or the performance bond outdated, require a comprehensive bond review and update of all reclamation and operating plans, and a recalculation of reclamation costs within a specified time period

Complexity/Objectivity

5. Problem: Calculations of reclamation costs and oversight of performance bonds are becoming more complex and require financial expertise as well as engineering expertise. Related issues such as bankruptcy, establishment of trust and other financial agreements, and oversight of sureties add to the complexities.
Solution: Hire staff knowledgeable about financial matters (separate from the engineers) to provide financial expertise in complex reclamation and bonding calculations; present and future values of money; annual and comprehensive five-year reviews; overhead amounts and percentages; and determining financial soundness of mining companies

6. Problem: There are control weaknesses and independence concerns with performance bonds.

Solutions: As recommended by the Legislative Auditor to reduce the state's risk of inadequate financial assurance, duties of bond management should be separated from the technical review of reclamation or corrective action proposals. Options include:

- A. Use the mine reclamation expertise in the Mine Waste Clean-up Bureau in the Remediation Division rather than the Environmental Management Bureau in the Permitting and Compliance Division
- B. As in other states, rely more on the bonding expertise of the U.S. Forest Service, Bureau of Land Management, and the Environmental Protection Agency. Often, federal agencies take the lead in developing bonding requirements which are then reviewed and approved by the state.
- C. Contract for reclamation cost estimates
- D. Hire staff knowledgeable about financial matters to assist with the financial complexities of bonding

Statutory Limitations

7. Problem: Performance bonds with a statutory maximum limit may not be adequate to cover all costs of reclamation. Reclamation and bonding are not required for some mining activities.

Solution: Eliminate the small miner bonding maximum and require reclamation and bonding in the amount of the estimated cost of reclamation for all mining activities, except those exempt under 82-4-310, MCA (operations disturbing less than 100 square feet)

Ability to Get the Money

Even if the performance bond amount is adequate to ensure the state has no risk of liability and will not incur reclamation costs, the state must have full, unconditional, and immediate access to the money if and when it is needed. The discussion at the beginning of the report showed that the money is not always easily accessible to pay reclamation costs. Problems in this area can be categorized in three groups.

Unforeseen Events/Changes in Circumstances

1. Problem: Potential problems may become evident at a site or off-site long after the mine has closed, reclamation completed, and the bond released.

Solution: Even though reclamation has been completed, allow all or a portion of the bond to be held as "retainage" until certain conditions have been met or until the risk to the state from any potential problems in the future has been eliminated

2. Problem: If something goes awry and reclamation costs exceed the bond amount, there is no substantial source of mining-related money available to pay the costs.

Solutions: Establish a "pool" of money paid by mining companies to be used for reclamation in cases when bonds are insufficient to cover costs. The money could originate from:

- A. a substantially higher permit fee than the current \$25;
- B. allocation of a portion of metalliferous mines license tax proceeds;
- C. an increase in the metalliferous mines license tax, dedicated to mine reclamation;
- D. a non-refundable percentage tax applied to the total amount of the required bond;
- E. a percentage applied to the total amount of the required bond that is refunded upon successful completion of reclamation, but kept otherwise; or
- F. interest earnings on cash, interest-bearing financial instruments, or bond proceeds.

Surety Bond/Legal Agreement Limitations

3. Problem: Surety bonds may require negotiation, litigation, and expenditure of time and money before the money is received. The end result may be a lesser amount, an amount paid out over time rather than in a lump sum, or an amount with conditions attached.
Solutions: Require all or a portion of the performance bond to be in cash or in a form that is more easily convertible to cash such as certificate of deposits, savings certificate assignments, irrevocable letters of credit, or negotiable securities. This could take the form of:
 - A. requiring a certain percentage of the required performance bond be in cash;
 - B. phasing out of surety bonds and into these other forms if and when a mine's cash flow increases over time;
 - C. requiring more of these other forms if the total amount of a performance bond is greater than a certain amount;
 - D. requiring the first year of performance bonds be posted in one of these other forms; or
 - E. requiring that certain items, such as contingencies, potential costs, and interim operations and management costs, be covered by a cash bond.
4. Problem: If the surety bond agreement or other agreements specify that a certain amount of the bond can only be applied to a specific task, some bond money may be unavailable for other reclamation tasks. This limits the flexibility of the state in how it can spend the money.
Solutions: To allow the state greater flexibility over bond amounts:
 - A. prohibit line-iteming of bond amounts;
 - B. require any and all portions of a bond to cover any and all costs of reclamation for that permitted mine; and
 - C. require that any and all bonds associated with a permitted mine apply to any and all costs of reclamation for that mine.
5. Problem: The Hard Rock Reclamation Surety Bond agreement used by DEQ does not fully protect the interests of the state in cases of default, cancellation, and litigation, nor does it recognize the role of the federal government when the mine is all or partially on federal land.
Solutions: Review and change the surety agreement and/or statute. For examples:
 - A. upon default or forfeiture by the principal, require that the full amount of the surety bond be made available immediately;
 - B. in the absence of substitute surety, require the original surety to remain liable for pre-cancellation disturbances even if mining continues after the effective date of the surety bond cancellation;

- C. to allow the state more time to pursue legal avenues, increase the time that a surety is still obligated after it cancels a surety bond from the current 30 days to 120 days;
 - D. require any reasonable legal fees that the state may incur to recover the security to be the obligation of the surety; and
 - E. for mines all or in part on federal land, require DEQ to consult with the applicable federal agency about becoming an obligee on the surety bond along with the state
6. Problem: Past legal documents and agreements have not provided adequate safeguards for the state's position. Surety bonds and subsequent agreements concerning Pegasus permits have allowed line-iteming of bond amounts and have allowed the surety to cancel the surety bond, thus causing the state to incur reclamation costs.
- Solution: Because of access to more resources, the Attorney General's office may be better equipped to bring an action on behalf of the state or to represent the state in matters of litigation and negotiation concerning payment, release, default, or forfeiture of performance bonds, similar to its role in the state's natural resource damage case against ARCO.

Statutory Limitations

7. Problem: State law may not be working as intended by the legislature. Mining companies or people who have not provided the state with adequate performance bonds and who have subsequently left the state with a liability (by defaulting) may still be permitted for mining in the state. Section 82-4-360, MCA, states that a person may not conduct mining or exploration activities in Montana if that person or a business association of that person had a bond forfeited.
- Solutions: The legislature may want to review this and other statutes to see if adequate measures of protection are being provided.
- A. If the legislature intended Section 82-4-360, MCA, to prevent those mining companies or responsible individuals who have defaulted (current law only addresses forfeitures) on their reclamation obligation from continuing to be permitted until they have paid all costs incurred by the state, then the statute needs to be amended to reflect that intent.
 - B. Metal mine reclamation statutes do not address the potential of bankruptcy by a mining company or the risk of adverse consequences to the state in such an event.
8. Problem: Current statute allows DEQ to accept performance bonds in forms whose value may fluctuate over time or with changing conditions (for example: real estate, mineral rights, and equipment).
- Solution: Amend statute to specify what types of performance bonds are acceptable, excluding items whose value may fluctuate over time or with changing conditions
9. Problem: Current statute is silent on the deposit of forfeited bond proceeds and interest earnings.
- Solution: Provide that all forfeited bond proceeds be deposited in the state treasury for reclamation use and all interest earnings be deposited in the hard-rock mining and reclamation account

Focus on the Entire Environment

Large mines may disturb large surface areas, remove large portions of mountains, and leave large pits with high rock faces. The traditional “reclamation” bond places an emphasis on returning the site to a usable state. The number of disturbed acres is an integral part of the reclamation cost calculations and, hence, the amount of the performance bond (for example, 82-4-338(1), MCA, states that a blanket bond must adequately secure the estimated total number of acres of disturbed land. It also sets the minimum amount of a bond at \$200 per acre of disturbance). However, large mines may affect areas beyond the disturbed areas of the mine through ground and surface water contamination and airborne particles. Some effects may not become apparent or detectable until after reclamation is completed and the bond is released. Other states recognize these two main components of reclamation and, in addition to the traditional “reclamation” bond, have a separate “environmental” bond (and separate statutes) that addresses costs associated with the possibility of extended, prolonged, and initially undetectable environmental damage. In some cases, this kind of “environmental” reclamation may be required into perpetuity.

The legislature may want to ensure statutes are up-to-date with the changing technology and capabilities of the mining industry. Although it may not be necessary or beneficial to hold separate bonds for “traditional” reclamation and “environmental” reclamation, the legislature may want to review statute to ensure it adequately addresses the “environmental” reclamation needs of the state and provides the necessary safeguards. Mining reclamation statute should focus on reclamation of the entire environment – the potential for long-term and offsite degradation (the “environmental” component) as well as restorative earth-moving and revegetation at the site. The current liability of the state discussed in this report was incurred in the “environmental” component and, most likely, it is the adequacy of the bond in this component that will determine if the state incurs future liability at metal mine sites.

Other

The following are some general items regarding reclamation and performance bonds that do not fit in the above groups, but which could lessen the state’s risk of liability.

1. The financial solvency of a mining company is important to the state in determining the company’s ability to perform according to the reclamation plan and operating permit. In order to provide the state with a measure of that ability, the legislature could require: 1) mining companies to submit a net asset statement and statement of solvency before permitting and each year thereafter; 2) an annual review of the solvency of mining companies; and 3) an immediate comprehensive bond review if the solvency of a mining company is in question.
2. The legislature could enact laws to address or strengthen the state’s interest regarding surety companies who may default, fail to perform, or go bankrupt.
3. As experienced with Pegasus mines, long-term water treatment and operation and maintenance costs require an on-going source of money. The legislature could provide the ability to convert bonds to trust funds or to accept trust funds as financial security to generate interest earnings to pay for long-term reclamation costs.

Legislative Options

Hopefully, this report has identified for the legislature existing and potential problems with metal mine reclamation and performance bonds. Numerous solutions to the problems were suggested. How does the legislature want to proceed from this point? This section summarizes the solutions and provides options for the legislature to consider.

Solution Summary

The following is a summary of all the solutions offered above.

Adequacy of Performance Bonds

1. Amend statute to allow contingencies for uncertainties and unexpected events to be included in reclamation cost calculations and the bond amount
2. Require a comprehensive bond review and recalculation of the reclamation costs sooner than the current five years (some states perform the review every two years)
3. After any bond review (or other events) indicates an increase in bond is needed:
 - A. require DEQ to give the mine operator notice of the additional bond within 30 days and require the posting of additional bond within 30 days of notice from DEQ and before consultation with the operator
 - B. require the posting of additional bond prior to any contested case hearing
4. If judicial decisions or statutory changes make either the reclamation plan or the performance bond outdated, require a comprehensive bond review and update of all reclamation and operating plans, and a recalculation of reclamation costs within a specified time period
5. Hire staff knowledgeable about financial matters (separate from the engineers) to provide financial expertise in complex reclamation and bonding calculations; present and future values of money; annual and comprehensive five-year reviews; overhead amounts and percentages; and determining financial soundness of mining companies
6. As recommended by the Legislative Auditor to reduce the state's risk of inadequate financial assurance, duties of bond management should be separated from the technical review of reclamation or corrective action proposals. Options include:
 - A. Use the mine reclamation expertise in the Mine Waste Clean-up Bureau in the Remediation Division rather than the Environmental Management Bureau in the Permitting and Compliance Division
 - B. As in other states, rely more on the bonding expertise of the U.S. Forest Service, Bureau of Land Management, and the Environmental Protection Agency. Often, federal agencies take the lead in developing bonding requirements which are then reviewed and approved by the state.
 - C. Contract for reclamation cost estimates
 - D. Hire staff knowledgeable about financial matters to assist with the financial complexities of bonding
7. Eliminate the small miner bonding maximum and require reclamation and bonding in the amount of the estimated cost of reclamation for all mining activities, except that exempt under 82-4-310, MCA

Ability to Get the Money

1. Even though reclamation has been completed, allow all or a portion of the bond to be held as “retainage” until certain conditions have been met or until the risk to the state from any potential problems in the future has been eliminated
2. Establish a “pool” of money paid by mining companies to be used for reclamation in cases when bonds are insufficient to cover costs. The money could originate from:
 - A. a substantially higher permit fee than the current \$25;
 - B. allocation of a portion of metalliferous mines license tax proceeds;
 - C. an increase in the metalliferous mines license tax, dedicated to mine reclamation;
 - D. a non-refundable percentage tax applied to the total amount of the required bond;
 - E. a percentage applied to the total amount of the required bond that is refunded upon successful completion of reclamation, but kept otherwise; or
 - F. interest earnings on cash, interest-bearing financial instruments, or bond proceeds.
3. Require all or a portion of the performance bond to be in cash or in a form that is more easily convertible to cash such as certificate of deposits, savings certificate assignments, irrevocable letters of credit, or negotiable securities. This could take the form of:
 - A. requiring a certain percentage of the required performance bond be in cash;
 - B. phasing out of surety bonds and into these other forms if and when a mine’s cash flow increases over time;
 - C. requiring more of these other forms if the total amount of a performance bond is greater than a certain amount;
 - D. requiring the first year of performance bonds be posted in one of these other forms; or
 - E. requiring that certain items, such as contingencies, potential costs, and interim operations and management costs, be covered by a cash bond.
4. To allow the state greater flexibility over bond amounts:
 - A. prohibit line-iteming of bond amounts;
 - B. require any and all portions of a bond to cover any and all costs of reclamation for that permitted mine; and
 - C. require that any and all bonds associated with a permitted mine apply to any and all costs of reclamation for that mine.
5. Review and change the surety agreement and/or statute. For examples:
 - A. upon default or forfeiture by the principal, require that the full amount of the surety bond be made available immediately;
 - B. in the absence of substitute surety, require the original surety to remain liable for pre-cancellation disturbances even if mining continues after the effective date of the surety bond cancellation;
 - C. to allow the state more time to pursue legal avenues, increase the time that a surety is still obligated after it cancels a surety bond from the current 30 days to 120 days;
 - D. require any reasonable legal fees that the state may incur to recover the security to be the obligation of the surety; and
 - E. for mines all or in part on federal land, require DEQ to consult with the applicable federal agency about becoming an obligee on the surety bond along with the state
6. Because of access to more resources, the Attorney General’s office may be better equipped to bring an action on behalf of the state or to represent the state in matters of litigation and negotiation concerning payment, release, default, or forfeiture of

performance bonds, similar to its role in the state's natural resource damage case against ARCO.

7. The legislature may want to review Section 82-4-360, MCA, and other statutes to see if adequate measures of protection are being provided.
 - A. If the legislature intended this section to prevent those mining companies or responsible individuals who have defaulted (current law only addresses forfeitures) on their reclamation obligation from continuing to be permitted until they have paid all costs incurred by the state, then the statute needs to be amended to reflect that intent.
 - B. Metal mine reclamation statutes do not address the potential of bankruptcy by a mining company or the risk of adverse consequences to the state in such an event.
8. Amend statute to specify what types of performance bonds are acceptable, excluding items whose value may fluctuate over time or with changing conditions
9. Provide that all forfeited bond proceeds be deposited in the state treasury for reclamation use and all interest earnings be deposited in the hard-rock mining and reclamation account

Focus on the Entire Environment

The legislature may want to ensure statutes are up-to-date with the changing technology and capabilities of the mining industry, adequately address the "environmental" reclamation needs of the state, and provide the necessary safeguards.

Other

1. In order to provide the state with a measure of a mining company's financial solvency, the legislature could require: 1) mining companies to submit a net asset statement and statement of solvency before permitting and each year thereafter; 2) an annual review of the solvency of mining companies; and 3) an immediate comprehensive bond review if the solvency of a mining company is in question.
2. The legislature could enact laws to address or strengthen the state's interest regarding surety companies who may default, fail to perform, or go bankrupt.
3. The legislature could provide the ability to convert bonds to trust funds or to accept trust funds as financial security to generate interest earnings to pay for long-term reclamation costs.

Avenues of Action

The following are some possible avenues of legislative action.

1. Approve specific solutions and instruct staff to draft a committee bill for committee approval and introduction in the next legislative session;
2. Request that DEQ submit possible solutions to limit state liability for consideration by the committee;
3. Instruct DEQ to administratively implement solutions to limit state liability and report back to the committee; and
4. Request legal staff to review reclamation and performance bond statute to determine if statute adequately address "environmental" reclamation